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In The

Supreme Court of the United States

October Term, 1972

No. 72-

72-142

JOHN J. RUISI and DOROTHY C. KORN,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1972

No. 72-

- -x

JOHN RUISI and DOROTHY C. KORN,

Petitioners,

-v-

UNITED STATES OF AMERICA,

Respondent.

- -x

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petitioners respectively pray that this Court will grant a Writ of Certiorari to review their respective judgments of conviction for violations of The Gun Control Act of 1968, 18 U.S.C. §922 (a)(1) (1970) (engaging in the business of ... dealing in firearms without a license) after trial before Chief Judge Jacob Mishler without a jury, in the Eastern District of New York. The United States Court of Appeals for the Second Circuit

affirmed the conviction. The Courts below both recommended a Presidential Pardon for the petitioners and a sentence of one day probation was imposed.

Opinion Below

The opinion of the Court of Appeals is annexed hereto and appears as Appendix I. (The Order of Affirmance is annexed hereto and appears as Appendix II.)

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1). A petition for rehearing was denied on June 26, 1972 (Appendix III).

Questions Presented

1. Whether petitioners could be convicted of violating 18 U.S.C. §922(a)(1) (the 1968 Gun Control Act) without any allegation or proof that interstate or foreign commerce was involved in any way in the transactions which were the subjects of the prosecution?

2. Whether the thrust of this Court's decision and opinion in United States v. Bass, 404 U.S. 336 (1971) reveals that the statute herein applies only to interstate or foreign commerce?

Questions Presented

3. Since the statute expressly declares that it is not designed to restrict or burden "law abiding citizens" (P.L. 90-618, Title I, §101), and it is undisputed that petitioners were licensed to sell these firearms in Manhattan, was it a perversion of Congressional intent to prosecute petitioners for selling the long guns in question at a Long Island gun show merely because their license did not technically include the two day show?

a. It was undisputed that a number of other dealers, to whom petitioners sold these guns, were also trading in guns at that show and that no provision for temporary off-premises licenses to sell guns had been made by the Treasury Department.

4. Whether petitioners' rights under the Sixth Amendment and Rule 48(b), Federal Rules of Criminal Procedure, were violated by an unexplained delay of one year between arrest and indictment and another delay of over one year between indictment and trial, despite motions made to dismiss for denial of speedy prosecution?

5. Whether the determination of the Courts below that the statute herein (18 U.S.C. §922[a][1]) affects intra state and interstate commerce violates the "Commerce Clause" (Art. 1, §8 Cl. 3, U.S. Const.) and conflicts with the Ninth and Tenth Amendments as well?

Constitutional and Statutory Provisions Involved

The Fifth, Sixth, Ninth and Tenth Amendments and "Commerce Clause" (Art. 1, §8 Cl. 3) of the United States Constitution and 18 U.S.C. §922(a)(1); 18 U.S.C. §1202(a)(1); the 1968 Gun Control Law, P.L. 90-618, Title I, §101 and Rule 48(b) F. R. Crim. Proc. are involved.

Statement of the Case

Introductory

It is significant that the petitioners herein are both what may be described as law abiding citizens. Mrs. Korn, as a matter of fact was a commissioned officer in the United States Coast Guard and both have clean records.

Both were employed by Kaufman Surplus & Arms Co. which was licensed to sell the guns in question from its two locations in Manhattan, New York City.

The guns in question were "long" in opposition to "hand" guns. Had the sale in question, as the Court below found, taken place at the site of the Manhattan locations of Kaufman Surplus and Arms Co., there would not have been any alleged violation.

During the week-end of October 18-19, 1969, a gun trade show was held in Melville, Long Island, N.Y. Both Korn and Ruisi attended as did many other dealers and gun enthusiasts.

The Court below found that there were 30 or 40 other dealers selling and buying guns at this show, including the petitioners herein. A total of eleven guns were sold by the petitioners at the show.

All purchasers were required to fill out the appropriate Form 4473 as required by the regulations promulgated pursuant to the Gun Control Act.

Mrs. Korn had taken the guns from Kaufman on consignment for the purposes of the show and returned the unsold guns to the stores after the show and deposited the money received from the sales into a Kaufman account.

It should be noted that since the statute did not apply to persons who were not dealers or manufacturers, had the consignment been viewed as a sale of guns by Mrs. Korn and/or Mr. Ruisi personally, the Act would not apply.

The crux of the case rests upon the interpretation of the Gun Control Act. It was and has been the position of petitioners throughout the case that since no aspect of foreign or interstate commerce is alleged or involved that the Act does not apply to the sales of long guns here involved. The Courts below and the Government have never disputed the fact that the transactions herein were exclusively intra-state.

Explanatory literature of the Alcohol, Tobacco and Firearms Agency of the Treasury Department

itself conceded that only interstate commerce was affected by the Act.

The issues are both statutory and constitutional. The constitutional issue precludes application of the Statute to intrastate commerce.

There is no allegation or contention that the petitioners were trying to act clandestinely or that they sought to sell these long guns to criminal elements. On the contrary, everything they did was open and above board.

The Historical Facts of the Case

There was no serious dispute about the fact as to the sales of some guns by petitioners at a gun show in the Electrical Workers Hall in Melville, Long Island, New York on the 18th and 19th days of October 1969. The Court held that the only issue involved in the instant case was the alleged sales of guns at the Long Island Gun Show and nothing more.

> "The Court: Mr. Anolik, forget everything that was said and everything charged about the record keeping at the two stores. I can understand where businessmen find it most difficult to comply" (231, 258a).

The petitioners conceded that in their own off-hours they attended the gun show and that Mrs. Korn had taken the guns in question on consignment to herself personally and that Ruisi was merely there as an accommodation to her and had not even been paid.

The Historical Facts of the Case

The Government's own witness, William Hillman, described the show as typical and said that there were about two hundred persons, dealers and individuals, selling and buying guns (133, 160a):

> "Q. Can you describe the circumstances under which you purchased those guns from Mr. Ruisi? A. Well, he had a table like the other people, like myself and others, and he was displaying and selling guns. I walked over and saw a couple of them that I liked and I purchased one...."

The Court refused to let the witness answer questions about his own sales as it would be self-incriminatory under the statute in the Court's interpretation thereof (140-141; 167a, 168a).

On cross-examination, Hillman further testified about the fact that many dealers and individuals were selling guns back and forth at the show (141, 168a):

> "Q. Do you know of anyone else selling guns that you knew to be dealers, not yourself? A. Yes, there were sales between dealers, back and forth.
>
> "Q. And individuals as well? A. And individuals.
>
> "Q. That is not unusual at a gun show? ... A. No."

The co-petitioner, Korn, testified that she had never sold any guns at a show before and that Ruisi was there only for companionship and to assist with carrying the guns (212, 239a):

"Q. Mrs. Korn, when you went to the show you went out knowing that you were acting as an individual, is that so? A. That's so.

"Q. This was the one and only time that you had ever gone to sell anything, isn't that so? A. Right.

"Q. And when you went out there, Mrs. Korn is it fair to say you brought Mr. Ruisi out there solely to assist you in carrying and displaying the guns? A. Companionship only. Only to handle the things. I couldn't carry them."

The Court itself was very troubled about the fact that a "felony" was committed by two persons who could have sold the guns legally at the Manhattan premises and that the statute was much too harsh (252, 279a):

"The Court: Mr. Ruisi went along and he knew they were selling guns. He may not have known that they needed a license. All I have said, the Government didn't prove that a license was required, but to place the mark of Cain on his brow, because he went out to sell a couple of guns, it sounds too hard."

The Court later said (244):

"I would be willing to support an application for a Presidential pardon."

The Court had hoped that the case would not be prosecuted. At 246, 273a of the Record it said:

> "I had rather hoped that the Government would not prosecute this case, and of course, any time the Government wants to say, 'We are ready to vacate the judgment and dismiss the indictment,' I am ready to go along with it. [Emphasis ours.]

The Statute

"§922. Unlawful Acts

"(a) It shall be unlawful—

"(1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce;

(2) for any importer, manufacturer, dealer, or collector licensed under the provisions of this chapter to ship or transport in interstate or foreign commerce any firearm or ammunition to any person other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, except that—

"(A) this paragraph and subsection (b)(3) shall not be held to preclude a licensed

importer, licensed manufacturer, licensed dealer, or licensed collector from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received; and this paragraph shall not be held to preclude an individual from mailing a firearm owned in compliance with Federal, State, and local law to a licensed importer, licensed manufacturer, or licensed dealer for the sole purpose of repair or customizing;

"(B) this paragraph shall not be held to preclude a licensed importer, licensed manufacturer, or licensed dealer from depositing a firearm for conveyance in the mails to any officer, employee, agent, or watchman who, pursuant to the provisions of section 1715 of this title, is eligible to receive through the mails pistols, revolvers, and other firearms capable of being concealed on the person, for use in connection with his official duty; and

"(C) nothing in this paragraph shall be construed as applying in any manner in the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States differently than it would apply if the District of Columbia, the Commonwealth of Puerto Rico, or the possession were in fact a State of the United States; ...." (Emphasis ours.)

Argument

Point I

THE STATUTE HEREIN SHOULD BE INTERPRETED CONSISTENTLY WITH THIS COURT'S CONSTRUCTION OF ANOTHER SECTION OF THE SAME ACT IN BASS v. UNITED STATES, THUS LIMITING ITS APPLICATION TO INTERSTATE AND FOREIGN COMMERCE ONLY.

A.

FEDERAL INTERVENTION IS NOT NEEDED IN A STATE LIKE NEW YORK WHICH HAS ONE OF THE STRONGEST GUN CONTROL STATUTES IN THE WORLD.

The petitioners herein did not engage in interstate or foreign commerce and no contrary contention exists in this case.

In Bass v. United States, 404 U.S. 336 (1971), this Court had occasion to interpret another section of this very Act. A detailed analysis will follow shortly. But at this juncture, it is submitted that when this Tribunal construed Title VII of this very legislation, it indicated that such Title covered a broader scope of activity than Title IV of the Statute which is involved in the case at bar.

Yet, the Courts below have given an analysis of the law which transcends and exceeds that which this Court gave to Title VII.

Everything that we consider about this Act, however, should be viewed in light of the Congres-

sional intent set forth at the beginning of the law which indicates that its purpose was definitely not designed to encompass what occurred in the case at bar. The prosecution herein is such a perversion of the law that both Courts below suggested Presidential Pardons for the petitioners. We submit that the implementation of the law was contrary to its plain language and therefore there should be a reversal and dismissal of the charges.

Nothing is accomplished by extending the thrust of the law beyond what this Court indicated in Bass.

The statute itself is not aimed at law abiding citizens (P.L. 90-618, Title I, Section 101 declares, inter alia:

> "The Congress hereby declares that the purpose of this title is to provide support to Federal, State and local law enforcement officials in their fight against crime and violence, and it is not the purpose of this Title to place any undue or unnecessary Federal restrictions or burdens on law abiding citizens with respect to ... firearms.")

The interpretative literature issued by the Alcohol, Tobacco and Firearms Agency of the Treasury Department was very equivocal to say the least during the first year following the passage of the Act. Thus the enforcement agency itself issued a bulletin indicating that it related to interstate and foreign commerce only (Appendix IV annexed).

Argument

A more detailed analysis of the statute will follow, but initially, we wish to note that the very language of Section 922(a) referring, inter alia to "importing, manufacturing, or dealing in firearms..." necessarily relates to foreign or interstate commerce since "importing" under any definition could not relate to intrastate activity.

The Court below in its opinion seemed to overlook or ignore the word "importing" since it could not otherwise have come to the conclusion which it did. Moreover it is difficult to understand how the Circuit Court could have ignored the plain language of Bass which seems so crystal clear that only interstate and foreign commerce is involved, and that the statute was not designed under this section to relate to intrastate activity. There would be no need for State legislation if the view of the Courts below were indeed to be deemed controlling.

The Federal Statute would pre-empt the whole area of gun control if the Second Circuit is sustained.

There is no allegation of "organized crime" involved in this case or in this portion of the Statute. Thus, we do not have the presumption of interstate activity as is the case in Perez v. United States, 402 U.S. 146 (1971). The particular Statute in Perez contained a specific congressional determination that extortionate extensions of credit involved interstate activity because it was a typical method of organized crime.

Argument

The administrating agency of the Treasury Department promulgated an interpretive bulletin in November 1969, specifically indicating that the Statute applied to interstate transactions only. A copy of the relevant portion thereof is annexed as Appendix IV, hereto. In addition, the licenses given to petitioner's employer, Kaufman Surplus & Arms Co. indicated that interstate commerce was the subject of the Federal Legislation.

It may be appropriate at this juncture to digress for a moment to assure this Tribunal that the petitioners do not question the right of the Government to legislate in the field of interstate gun control, nor to demean the importance of such controls. The simple fact is, however, that the petitioners were duly licensed by the Federal and local governments to deal in these long guns from two locations in Manhattan, and the sale of eleven at a gun show on Long Island is the predicate of this prosecution. The trial Court has acquitted the petitioners of any conspiracy to violate the law.

Turning now to the Statute itself, we find that upon analysis it ought not to have been applied to the facts of this case.

Congress was obviously aware that at gun shows, firearms are bought and sold and yet apparently no possibility of a permit was provided. Thus it is clear that such restriction was aimed at interstate transactions and were not meant to interfere with transactions involving licensed dealers who were violating no State laws.

Argument

Since Bass, the United States District Court for the Northern District of California has recently considered a prosecution under the same section of Title 18 as that which is involved in the case at bar. District Judge Robert Peckham dismissed the indictment in this case, United States v. Bennie Sherman Redus, 71 Cr. 315 RFP.

In the Bass case, supra, the Supreme Court of the United States held Title VII to be ambiguous in that the language of §1202 is subject to two possible interpretations.

> "1. Any person who ... has been convicted ... of a felony ... and who receives, possesses, or transports in [interstate] commerce any firearm [is guilty of a felony]. [Emphasis added], or,
>
> "2. Any person who ... has been convicted ... of a felony ... and who receives [in interstate commerce], possesses [in interstate commerce], or transports in [interstate] commerce any firearm [is guilty of a felony]." (Emphasis added.)

In Bass the Court said that

> "... ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. [When] choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite .....

> This principle is founded on two policies which have long been part of our tradition. First, 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.' United States v. Bass, supra [citing authorities].
>
> "Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." Op. cit.
>
> "There is a second principle supporting today's result: unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the states." Op. cit.

Following these principles, the Supreme Court determined that there must be a nexus or touching with interstate or foreign commerce to bring the defendant within the statute. §1202 was thus interpreted to read, "receives in interstate commerce, possesses in interstate commerce, or transports in interstate commerce."

In the case at bar, we are dealing with Title IV of the Act (Title I of Title 18 U.S.C.). In Title IV, §922(a)(1) is ambiguous in exactly the

same way that §1202 of Title VII is ambiguous. Again, the Statute is susceptible to two readings, viz:

> "1. It shall be unlawful for any person, except a ... licensed dealer ... to engage in the business ... of dealing in firearms or ammunition [not in interstate commerce] or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce. [Emphasis added.]
>
> "2. It shall be unlawful for any person, except a ... licensed dealer ... to engage in the business ... of dealing in firearms or ammunition ... in interstate or foreign commerce." (Emphasis added.)

It is significant to bear in mind that the Supreme Court has ruled that the two sections do in fact complement each other and that Title VII "punishes a broader class of behavior" than does Title IV.

Conversely, Title IV must therefore cover a narrower class of behavior. Since Title VII has now been interpreted to cover only possession or receiving in interstate or foreign commerce, it follows logically that the "dealing" referred to in Title IV must also be "dealing in interstate or foreign commerce." Any other interpretation would broaden, rather than narrow, the class of persons controlled by the Statute.

Argument

New York State already has one of the strongest gun laws in the nation and it is, therefore, apparent that Congress did not intend to in any way attentuate the State Statute (the Sullivan Law).

The language of the Federal Statute itself, under paragraphs of Title IV, speak frequently of "interstate and foreign commerce." Various paragraphs, including §922(a)(1) and (2), §922(g), §922(h), and §923(d)(1)(B) all use the same language. The Statute also carefully defines "interstate" in §921 (a)(1) of Title IV. We thus have an act where, clearly, the great majority of conduct controlled by the Act is that which moves in or has a nexus with interstate commerce. The sole question is whether "dealing" in firearms must also have such an interstate facet.

In Bass the Supreme Court cited with approval the language of Tot v. United States, 319 U.S. 463 (1942), to the effect that "[T]he act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, as an intrastate transaction, of such articles which, at some prior time, have been transported interstate." The Court went on to state that while the reach of Title IV itself is a question not decided by the Bass case, that case presented no learning or other evidence indicating that the 1968 Act changed the prior approach to the "receipt" offense.

Reading §922(a)(1) in light of Bass and all the foregoing considerations, and applying the

principles enunciated by the Court in Bass, leads inescapably to the conclusion that the words in "in interstate or foreign commerce" in §922(a)(1) affect each of the antecedent clauses with equal vigor.

In accord with such conclusion is United States v. Glup (U.S.D. Neb. 4/12/72) Cr. 01607, where the District Judge, on the basis of the Bass principles and after careful analysis of the Section here involved and legislative history held the Section not to reach wholly intrastate dealings in firearms and the indictment there involved faulty and fatally defective for failure to allege a connection with interstate commerce.

It is therefore submitted that the timely pretrial motion to dismiss the indictment for failure to allege foreign or interstate commerce should have been granted and this Court should vacate the conviction and dismiss the indictment.

We submit that the foregoing analysis itself is sufficient to demonstrate the fallacy of the Circuit Court's reasoning. But perhaps it would be appropriate to return to what the Court below, itself, considered the controlling language, i.e.,

> "922. (a) It shall be unlawful—
>
> "(1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such

business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce...." (See slip opinion below, p. 3144.)

There can be no "importing" without crossing the boundary of the State in some way. In other words, the term "importing" really has no significance so far as an intrastate activity is concerned. There would have to be some crossing of State or National boundaries to make the term meaningful at all. Since the word "importing" is used in a series and the paragraph concludes by expressly referring to "interstate or foreign commerce," it is obvious that the clause was designed to apply only in the interstate and foreign commerce sense. An importer is also "dealing."

It is submitted therefore that certiorari should be granted and the charges ought to be held unsustainable.

The Opinion of the Court of Appeals relies upon the Congressional Record to determine that Section 922(a)(1) refers to both interstate and intrastate commerce. We submit, however, that reliance upon the Congressional Record is not open to the average citizen who is expected to obey the law as written. Without characterizing the Congressional Record as clear or ambiguous, it is submitted that the Statute itself is sufficiently ambiguous so as to require the same result with respect to this Section as this Court determined with respect to the Section involved in United States v. Bass, supra, and to thus limit its application to interstate and foreign commerce.

Argument

Point II

THE COURTS BELOW, IN ESSENCE, RULED THAT CONGRESS HAD INTENDED THAT SECTION 922(a)(1) SHOULD AFFECT INTRASTATE AS WELL AS INTERSTATE COMMERCE. NOT ONLY IS THAT SECTION VERY AMBIGUOUS, BUT THE INTERPRETATION IS INCONSISTENT WITH UNITED STATES v. BASS, 404 U.S. 336. MOREOVER, THE RULINGS BELOW ARE IN CONFLICT WITH THE "COMMERCE CLAUSE" (Art. 1, §8, Cl. 3, U.S. Const.) AND THE NINTH AND TENTH AMENDMENTS.

We do not believe it is necessary to dwell at length on this aspect of our argument since it has been covered in United States v. Perez, 402 U.S. 146 (1971), and in United States v. Bass, supra. Suffice it to say that where Congress has not expressly declared its intention to pre-empt a field regulated by the State, there should be no inference that such pre-emption has occurred. (California v. Zook, [1949], 336 U.S. 725, reh. denied 337 U.S. 921.)

Wherever Congressional action was intended to supersede State Legislation in a particular field, Congress has not found it difficult to expressly declare its purposes. This was specifically true as this Court found in United States v. Perez, supra.

See, also, Kelly v. Washington, 302 U.S. 1, 10 (1937); Allen-Bradley Local, U.E.R.M.W. v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942); and, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

It is also noteworthy that in the Published Ordinances on Firearms (State and Local Laws) Publication 603 (6-71), page 10, the Alcohol, Tobacco and Firearms Division refers to Section 922(a)(1) as controlling to interstate and foreign commerce.

Both the Ninth and Tenth Amendments make it clear that powers granted to Congress are specific and those which are not enumerated are reserved for the states. (Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23, 72 [1824]).

It should be noted that in the case at bar there is no Congressional purpose manifested which requires the assumption that Congress intended intrastate commerce to be affected.

The Statute here in question has not been promulgated under any taxing authority or similar policy which reinforces the view that intrastate commerce was not to be affected.

In a recent case in the District Court of Nebraska, United States v. Glup, Cr. 01607, decided 4/12/72, the District Judge (Denney) held that the Section herein involved (§922[a][1]) affected only interstate commerce. Redus, supra is in accord.

We should also point out that cases which the Government may cite, such as United States v. Nelson, (5 Cir.), 3/16/72, No. 71-3050; United States v. Hudson, (4 Cir.), 5/22/72, No. 72-1101; United States v. Crandell, (1 Cir.), 1/17/72, No. 71-1212; and similar cases, are interpreting a

different section of this statute which deals with false statements, namely Section 922(a)(6), and not the section which we are concerned with, namely Section 922(a)(1). Those cases, incidentally, do not indicate that §922(a)(1) should be decided as affecting intrastate commerce.

Since United States v. Redus, supra, is pending sub judice before the Ninth Circuit, we ask that this Court consider that case since we anticipate it may be decided contrary to the case at bar.

Point III

THE PETITIONERS WERE DENIED SPEEDY JUSTICE IN VIOLATION OF THE SIXTH AMENDMENT AND RULE 48(b) F. R. CRIM. P. BY VIRTUE OF THE UNJUSTIFIED AND UNEXPLAINED DELAY OF ONE (1) YEAR BETWEEN ARREST AND INDICTMENT AND OF OVER AN ADDITIONAL ONE YEAR HIATUS BETWEEN INDICTMENT AND TRIAL, DESPITE MOTIONS TO DISMISS FOR WANT OF SPEEDY JUSTICE.

The trial herein occurred two years and two months after arrest. The indictment was not returned until one year after the arrest and the trial not until over one year thereafter. The petitioners made prompt and timely motions to dismiss for lack of speedy justice under the Sixth Amendment and Rules 48(b) F. R. Crim. P.

The Government did not answer the motions until several months later, thus delaying decision thereon. No excuse or reason was advanced for the delay.

Argument

The Circuit Court, relying on United States v. Marion, 404 U.S. 307 (1971) and some lower Court cases, denied relief because no prejudice was proved.

The burden of proof rests with the prosecution at all times. We submit that Marion has been perverted into a rule that the accused bears the burden of establishing prejudice in a speedy trial situation. Once the issue is timely raised, as is the case herein, the Government ought to be obliged to disprove prejudice, not vice versa.

The Sixth Amendment clearly requires a speedy trial. Rule 48(b), F. R. Crim. P. makes this even more apparent. No Speedy trial was afforded herein despite a motion to dismiss. In United States v. Vuitch, 402 U.S. 62, the Supreme Court stated that the negative must be disproved by the Government where it is relevant. It is clear that once the prosecution has denied speedy justice, it ought not benefit from its own dereliction by having the burden shift to the accused to demonstrate prejudice. Such an obligation might well infringe the Fifth Amendment privilege against self-incrimination since it could require testimonial proof from the defendant involved. No defendant in a criminal case is obliged to testify in his own behalf. Thus the Marion case is being applied unfairly and is being distorted into a rule that in essence repeals the Sixth Amendment guarantee and the thrust of Rule 48(b).

Argument

The Marion case is distinguishable since no charges had been lodged and no arrest had occurred. In the case at bar, however, the defendants-petitioners were arrested and were not charged for one year by way of indictment, and were not brought to trial for more than an additional year. Thus, since an arrest had actually taken place, the Government was obligated to proceed with dispatch, particularly since a timely motion to dismiss had been made.

In Marion, however, no arrest or charge had occurred so the public was not aware and the defendants were not under the stigma of a criminal charge.

In Baker v. Wingo, ___ U.S. ___, (6/22/72), this Court indicated that a "balancing" of interests should be the test. On balance, there is no justification for this delay.

In Baker v. Wingo, supra, this Court explained, inter alia (11 Cr. L. 3179):

> "A balancing test necessarily compels courts to approach speedy-trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

"The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.

"Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay."

The delay is a denial of due process under the Fifth Amendment and a violation of the Sixth,

as well as of Rule 48(b) F. R. Crim. P. Pollard v. United States, 352 U.S. 354, 361-2 (1957); Hanrahan v. United States, (D.C. Cir. 1965), 348 F.2d 363. See, People v. Minicone, 28 N.Y.2d 138, 141.

There was a timely motion to dismiss. The Government made no reasonable explanation.

In Dickey v. Florida, 398 U.S. 30, Justice Brennan cogently noted:

> "... the equation of silence or inaction with waiver is a fiction that has been categorically rejected by this Court when other fundamental rights are at stake. Over 30 years ago in Johnson v. Zerbst, 304 U.S. 458, 464 ... (1938), we defined 'waiver' as 'an intentional relinquishment of a known right or privilege.' We have made clear that courts should 'indulge every reasonable presumption against waiver,' and that they should 'not presume acquiescence in the loss of fundamental rights.' ...
>
> "A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right as a purposeful failure...."

In 1844, an English Judge dealing with a problem similar to that presented herein, opined very aptly (Regina v. Robbins, 1 Cox C.C. 114):

"I ought not to allow the case to go further.

> It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back?... [I]f the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on trial." (Emphasis supplied.)

See,

> 5 Stan. L. Rev. 95, 104, 1952, "Justice Overdue — Speedy Trial for the Pre-Trial Defendant."

We would ask this Court to consider the recent case of United States v. Vuitch, 402 U.S. 61, where the Supreme Court indicated that the Government must carry the burden of proof in all cases. Even where there may be an affirmative defense, the Government must disprove its existence.

In essence, the ruling of the Court means that despite the fact that a defendant raises the issue of speedy trial under the Constitution and asserts a violation of Rule 48(b) F. R. Crim. P., the burden rests upon the defendant to prove that the Government denied him a speedy trial to his prejudice and it is not enough that he prove that speedy justice was simply denied.

In other words, although in the case at bar there is a classic situation of an unconscionable

delay without justification in bringing a case to trial, the Court below reasons that because the defendants failed to prove they were actually prejudiced, that no violation has occurred.

Conclusion

The Writ of Certiorari should be granted.

Respectfully submitted,

s/ Irving Anolik
IRVING ANOLIK
Attorney for Petitioners

Appendix I

Opinion of the Court Below

George H. Weller, Assistant United States Attorney (Robert A. Morse, United States Attorney for the Eastern District of New York, David G. Trager, Assistant United States Attorney, on the brief), for Appellee.

Hays, Circuit Judge:

Appellants were convicted in the United States District Court for the Eastern District of New York, after a nonjury trial, for "engag[ing] in the business of . . . dealing in firearms" without a license, in violation of the Gun Control Act of 1968, 18 U.S.C. §922(a)(1) (1970). The district court dismissed a count charging conspiracy to violate that section. The district judge suspended the imposition of sentence as to both defendants and placed each on probation for a period of one day. Appellants have appealed the judgment of conviction entered on the substantive count.

I.

Appellant Korn is the president and sole stockholder of Kaufman Surplus and Arms, Inc., a corporation which operates two stores in Manhattan specializing in the sale of war surplus material, including firearms. Appellant Ruisi is an employee at one of the stores. The corporation is not primarily engaged in the business of dealing in firearms, but it had federal licenses to deal in firearms at both of its stores.

Opinion

Under the federal statute, an enterprise dealing in firearms must obtain a license for each location at which it sells guns. It cannot obtain a temporary license to sell firearms at a location other than at its bona fide business location. For example, a licensed dealer cannot obtain a license to deal in firearms at a trade show or gun show if that show is held at a location other than the site of the dealer's licensed business.

During the weekend of October 18-19, 1969, appellants Korn and Ruisi attended a gun show held at a union hall in Melville, Long Island. Appellant Korn selected approximately 20 guns from one of the Kaufman stores to take to the show. The guns were "long," as opposed to "hand," guns, and, while they were not all manufactured before 1898 so as to be antiques within the meaning of the Act, the firearms were not new, and some would have needed repairs to make them operable. At the show, appellants set up a display table on which the firearms were placed. About 30 to 40 firearms dealers as well as a number of others attended the gun show and firearms were bought and sold. Appellants Korn and Ruisi sold a total of eleven guns. Appellant Korn had initially set the sales price for each item, and Ruisi conducted the actual sales from the display table, although on occasion he did confer with appellant Korn, who was standing nearby, before making a particular sale. Appellant Ruisi required each purchaser to fill out Form 4473, as required by regulations promulgated pursuant to

the Gun Control Act. This form requires detailed information about the purchaser and seller of the firearm, as well as the transaction itself. After the gun show was over, the appellants returned the unsold firearms to one of the Kaufman stores, and appellant Korn deposited the money received from the sales in an account in the name of Kaufman. Neither Korn, Ruisi, nor Kaufman Surplus and Arms, Inc. had a license to deal in firearms at the union hall in Melville where the show was held, nor, as we have indicated above, would it have been possible for them to obtain such a license.

Appellant Korn contended at the trial that she had taken the firearms on consignment from Kaufman Supply and Arms, Inc. and sold them as an individual owner, so that she was not a dealer in firearms within the meaning of the Act. The district court ruled that the appellants "on behalf of the corporation were engaged in the sale of firearms at that [gun] show," and thus violated the statute by engaging in the business of dealing in firearms without a license. The record contains overwhelming evidence to support this finding, and appellants do not challenge it on appeal. The district court found that appellant Korn knew that the unlicensed sales violated federal law but that appellant Ruisi did not. It held, however, that §922(a)(1) does not require that the government establish that the defendant know that the unlicensed dealing in firearms violates federal law.

II.

Appellants' first ground for challenging their conviction is that the statute applies only to interstate dealing in firearms. They urge that, since the proof at trial established that the transactions in which they engaged were entirely intrastate, the conviction should be reversed and the indictment dismissed.

The relevant section of the Act, 18 U.S.C. §922(a)(1) (1970), provides:

> "§922. UNLAWFUL ACTS
>
> (a) It shall be unlawful—
>
> (1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce; . . . ."

Appellants cite United States v. Bass, 404 U.S. 336 (1971) for the proposition that the statute proscribes only interstate dealing in firearms and does not apply to intrastate dealing. They argue that the clause "in interstate or foreign commerce" modifies both the phrase "to ship, transport, or receive" and the phrase "importing, manufacturing, or dealing." In view of the language of the statute itself and the legislative history of the Gun Control Act we must reject appellants' contention.

In United States v. Bass, supra, the Supreme Court interpreted the phrase "in commerce or affecting commerce" which appears in 18 U.S.C. §1202(a)(1) (1970), as applying to all three antecedents — "receives, possesses, or transports" — and not solely to the last antecedent, "transports." The Court emphasized the ambiguity of the statute and the meagerness of the legislative history, 404 U.S. at 343-45, 347. It relied on the principle that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant," id. at 348, and the principle of federalism that "unless Congress conveys its purpose [to reach intrastate activities] clearly, it will not be deemed to have significantly changed the Federal-State balance," id. at 349 (footnote omitted).

Unlike the statute involved in Bass, §922(a)(1) is not ambiguous. From the wording and punctuation of the section it is entirely clear that the "in interstate or foreign commerce" requirement does not modify the proscription against unlicensed "dealing in firearms." It is impossible to read the statute except as demonstrating that Congress intended to make unlawful unlicensed dealing in firearms whether interstate or intrastate. See Perez v. United States, 402 U.S. 146 (1971).

The legislative history of the statute unequivocally supports the conclusion that Congress intended to proscribe unlicensed intrastate dealing in firearms. See S. Rep. No. 1097, 90th Cong., 2d Sess., (1968) U.S.C. Cong. & Admin. N. 2114, 2202:

> "The existing Federal controls over interstate and foreign commerce in firearms are not sufficient to enable the States to effectively cope with the firearms traffic within their own borders through the exercise of their police power. Only through adequate Federal control over interstate and foreign commerce in firearms, and over all persons engaging in the business of importing, manufacturing, or dealing in firearms, can this problem be dealt with . . . . (Emphasis added.)
>
> * * *
>
> "The prohibition [of §922(a)(1)] goes to both an unlicensed person engaging in a firearms business and such a person who, in the course of that business, ships, transports, or receives, a firearm or ammunition in interstate or foreign commerce. Thus, the [section] makes it clear that a license is required for an intrastate business as well as an interstate business."

See also H.R. Rep. No. 1577, 90th Cong., 2d Sess., (1968) U.S.C. Cong. & Admin. N. 4418:

> "[Section 922(a)(1)] makes it clear that a license is required for an intrastate business as well as an interstate business."

The convictions must be sustained even though there was no showing that appellants' dealing in firearms was in interstate or foreign commerce.

Appellant Ruisi contends that the statute requires that the government establish that he knew his act of unlicensed dealing in firearms was in violation of federal law, and that his conviction must be reversed because the district court found he did not know he was violating federal law. However the statute does not require that the government establish, as an element of the crime, that the person charged with unlicensed dealing knew of the law. Congress did not make ignorance of the law a defense in a prosecution for unlicensed dealing in firearms. Compare 18 U.S.C. §922(f) (1970). See United States v. 16,179 Molso Italian .22 Caliber Winlee Derringer Convertible Starter Guns, 443 F.2d 463, 466 (2d Cir.), cert. denied, 404 U.S. 983 (1971). There is no constitutional requirement that scienter be established as an element of the crime nor will Congress be presumed from silence to have intended to make it so when the purpose of the statute is to regulate objects or activities which in and of themselves are dangerous or harmful. See United States v. Dotterweich, 320 U.S. 277, 280-81 (1943); Morissette v. United States, 342 U.S. 246, 250-61 (1952); United States v. Freed, 401 U.S. 601, 609 (1971) ("This is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act" (footnote omitted). As the Supreme Court recently said in United States v. International Minerals & Chemical Corp., 402 U.S. 558, 565 (1971):

> "But where, as here and as in . . . Freed, dangerous or deleterious devices or products . . . are involved, the probability of regulation is so great that anyone who is aware that he is . . . dealing with them must be presumed to be aware of the [law]."

Given the dangerous nature of the objects regulated by §922(a)(1) a congressional intent to provide that ignorance of the law is a defense will not be presumed, and appellant Ruisi's conviction is affirmed.

Appellants' final contention — that a one year delay between the arrest and the indictment warrants dismissal of the indictment — is without merit. The appellants have alleged no specific prejudice arising from the delay, but merely that they suffered "obloquy, . . . disgrace and . . . intangible economic consequences . . . ." Allegations of prejudice such as these are insufficient. See United States v. Marion, 404 U.S. 307 (1971); United States ex rel. Schaedel v. Follette, 447 F.2d 1297 (2d Cir. 1971); United States v. DeMasi, 445 F.2d 251 (2d Cir.), cert. denied, 404 U.S. 882 (1971). Cf. United States v. Binder, 453 F.2d 805 (2d Cir. 1971).

In view of the sentence imposed and of certain remarks of Chief Judge Mishler in the course of the trial, the question of why the government chose to prosecute these cases inevitably arises. The record does not reveal any reason for doing so. Appellants have apparently not been engaged in any previous criminal activity, and were at all

times cooperative with the federal authorities. This felony conviction could constitute a severe penalty, since it might result in the revocation of the license to deal in firearms, as well as in other possible disabilities. Unless there is some justification of which we are unaware for undertaking this prosecution for what appears to be a mere technical violation of the statute, Chief Judge Mishler's suggestion of an application for a Presidential pardon would seem to be justified.

Appendix II
Order of Affirmance

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 72-1223

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of May one thousand nine hundred and seventy-two.

Present:

HON. STERRY R. WATERMAN,
HON. PAUL R. HAYS
HON. WILFRED FEINBERG,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN J. RUISI, JR., and
DOROTHY C. KORN,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,

Clerk

Appendix III

Order Denying a Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

72-1223

United States of America,

Plaintiff-Appellant,

v.

John J. Ruisi, Jr. and Dorothy C. Korn,

Defendants-Appellants.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

June 26, 1972

Order Denying a Rehearing

s/ Paul R. Hays

s/ Wilfred Feinberg

I join in denying the petition for rehearing but, having in mind the suggestion of Chief Judge Mishler, (see p. 3148 of 2 Cir. slip sheets, Sept. Term 1971), I would grant the stay of our mandate.

Sterry R. Waterman

June 14, 1972

Appendix IV
Internal Revenue Service
Published Ordinances Firearms

State Laws and Local Ordinances Relevant to Title 18 U.S.C. Chapter 44

QUESTIONS AND ANSWERS GUN CONTRÓL ACT OF 1968

Introduction

1) Who enforces the new Federal gun law?

The Gun Control Act of 1968 and other Federal firearms laws are enforced and administered by the Alcohol, Tobacco, and Firearms Division of the Internal Revenue Service, U.S. Treasury Department.

2) Does the Gun Control Act of 1968 replace other Federal Firearms laws?

Internal Revenue Service
Published Ordinances Firearms

Yes. The Gun Control Act consists of three parts:

a. Title I, which amended Chapter 44, Title 18, U.S.C. Chapter 44 was first enacted into law by the Omnibus Crime Control and Safe Streets Act of 1968 and it repealed the Federal Firearms Act.

b. Title II, which amended the National Firearms Act of 1934, and is generally cited as the National Firearms Act Amendments of 1968, or merely as the National Firearms Act.

c. Title VII, which contained amendments to the original Title VII of the Omnibus Crime Control and Safe Streets Act of 1968.

3) What do these firearms laws cover?

Title I covers the licensing of persons engaged in the firearms business in any manner, including the buying and selling of curios and relic firearms by persons licensed as collectors of those items only. It strictly controls interstate commerce in firearms and ammunition, and importation of those items.

Title II regulates the manufacture, importation and transfer of those types of firearms as defined in the National Firearms Act by the imposition of special (occupational) taxes on those persons who are registered with the Secretary of the Treasury as qualified to engage in such business.

However, the payment of such taxes and the registration are in addition to, and not in lieu of, the license requirements of Title I. Title II also contains the transfer tax and making tax provisions of the National Firearms Act.

Title VII governs the receipt, possession or transportation of firearms by felons, veterans who are other than honorably discharged, mental incompetents, aliens who are illegally in this country and former citizens who have renounced their citizenship. Title VII makes it unlawful for the above persons to receive, possess or transport any firearms in commerce or affecting commerce.

4) Does the new law regulate who can be in the gun business?

Under the Gun Control Act there are certain standards for issuing required licenses to those engaged in various firearms businesses. One standard of particular importance to an applicant for a business license (not a collector's license) is that the applicant must have business premises, i.e.: premises open to the public.

Licenses

5) How does someone get licensed under the Gun Control Act?

An application for license, Form 7 (Firearms), must be filed in duplicate by anyone who

intends to engage in the firearms business. The application should be filed, with the proper license fee, with the District Director, Internal Revenue Service, for the Internal Revenue district in which the applicant resides or intends to have his business premises.

6) Can one license cover several locations of the same licensee?

No. A separate license must be obtained for each location at which the licensee conducts a firearms business. However, places used only for storage of firearms and ammunition need not be licensed.

7) Who can get a license under the new Act?

The application will be approved if the applicant meets the following:

1. Is 21 years of age or over.

2. Is not prohibited from shipping or receiving firearms or ammunition in interstate commerce.

3. Has not willfully violated any of the provisions of the Gun Control Act of 1968 or its regulations.

4. Has not willfully failed to disclose required material information or willfully made false statements concerning material facts in connection with his application.

Internal Revenue Service
Published Ordinances Firearms

5. Has premises in the United States from which the business or collecting subject to license will be conducted.

8) What is the fee for a yearly license under the Gun Control Act?

The following is the schedule of license fees:

Firearms (other than destructive devices)

Manufacturer	$50
Importer	50
Pawnbroker-Dealer	25
Dealer	10
Gunsmith	10
Collector (only for curios and relic firearms)	10

Destructive devices and destructive device ammunition

Manufacturer	$1,000
Importer	1,000
Dealer	1,000

All ammunition except that for destructive devices

Manufacturer	$10
Dealer	10

9) Are licenses issued on a fiscal year basis?

No. Licenses are issued as soon as applications are approved and are valid for one year from the date of issuance.

10) What type firearms may be transferred interstate between licensed collectors?

Interstate transactions between licensed collectors are limited to those firearms classified as curios and relics.

11) May a person who was engaged in the business of selling only shotgun shells and .22 caliber rimfire ammunition who was not licensed under the Federal Firearms Act continue to engage in such business on and after December 16, 1968?

Yes, if such person has obtained, or has filed an application for, a license under Title I, Gun Control Act of 1968. Other licensees may continue to ship such ammunition to such "dealers" upon a showing that the transferee has filed an application under the provisions of Title I. An extra copy of Form 7 filed with the District Director may be prepared and furnished the ammunition supplier as evidence that the purchaser has made timely application for a license.

12) If a person timely files an application for the renewal of his license and his present license expires prior to his receipt of the license so applied for, may he continue to conduct the business covered by his expired license?

Internal Revenue Service
Published Ordinances Firearms

Yes, a person who timely files an application for the renewal of his license may continue such operations as were authorized by his expired license until his application is finally acted upon. This also applies in the case where the holder of a . . . .

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-142

JOHN J. RUISI AND DOROTHY C. KORN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Eastern District of New York, petitioners were convicted of having engaged in the business of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1). They were sentenced to probation for one day. The court of appeals affirmed (Pet. App. 1a-9a). The evidence is not in dispute and is set forth in the opinion below (Pet. App. 1a-3a).[1]

[1] Petitioner Korn owns a corporation with two stores in Manhattan specializing in the sale of war surplus goods. Petitioner Ruisi is an employee at one of the stores. The corporation had federal licenses to deal in firearms at the stores. The present charges were based on petitioners' sales of firearms at a gun show in Long Island where the licenses were inapplicable.

1. Petitioners contend that the statute does not apply to intrastate dealing in firearms. This contention is answered in the opinion below (Pet. App. 4a–6a), which points out that the unambiguous language and legislative history of the act show that it was intended to prohibit all unlicensed dealing in firearms. Petitioners' reliance on *United States* v. *Bass,* 404 U.S. 336, is misplaced since that case dealt with another, differently worded provision of the Act with a meager and inconclusive legislative history. Although the present case is apparently the first to reach an appellate court involving this subsection,[2] we note that the courts of appeals have uniformly determined that another subsection, 18 U.S.C. 922(a)(6), prohibiting the making of false statements to a dealer in connection with the acquisition of a firearm, applies to all such false statements irrespective of any nexus between the particular firearm and interstate or foreign commerce. *E.g., United States* v. *Menna,* 451 F. 2d 982, 984 (C.A. 9), certiorari denied, 405 U.S. 963; *United States* v. *Nelson,* 458 F. 2d 556 (C.A. 5); *United States* v. *White,* 451 F. 2d 696 (C.A. 5), certiorari denied, 405 U.S. 998; *United States* v. *Hudson,* C.A. 4, No. 72–1101, decided May 22, 1972; *United States* v. *Crandall,* 453 F. 2d 1216 (C.A. 1). Petitioners' contention that, if interpreted to apply to intrastate dealings in firearms, Section 922(a)(1) impinges upon the powers reserved to the States is without merit in view of the principles enunciated in *Perez* v. *United States,*

[2] Two district courts—*United States* v. *Fancher,* 323 F. Supp. 1069 (D. S.Dak.); *United States* v. *Gross,* 313 F. Supp. 1330 (S.D. Ind.)—have reached the same conclusion as the court below.

402 U.S. 146. See *Nelson, supra,* 458 F. 2d at 559; *Crandall, supra,* 453 F. 2d at 1217.

2. Petitioners also urge that they were denied the right to a speedy trial. The offenses at issue occurred in mid-October 1969. Petitioners were arrested on October 29, 1969, and the indictment was returned approximately one year later on October 13, 1970. Petitioners filed a motion to dismiss the indictment for lack of a speedy trial on December 4, 1970, and the motion was denied on July 14, 1971. The trial commenced on December 13, 1971.

Petitioners were at all times released on their own recognizance prior to trial. Following indictment they made no demand for a speedy trial,[3] nor did they allege any prejudice resulting from either the pre-indictment or post-indictment intervals. And the intervals were not themselves unduly lengthy. In these circumstances petitioners' rights under the Sixth Amendment and Rule 48, F. R. Crim. P. were not violated. See *United States* v. *Marion,* 404 U.S. 307; *Barker* v. *Wingo,* No. 71–5255, decided June 22, 1972.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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[3] As this Court noted in *Barker* v. *Wingo*, No. 71–5255, decided June 22, 1972, slip op. pp. 20–21, a motion to dismiss the indictment cannot be construed as a demand for a speedy trial since the remedy sought is not trial but dismissal of the charges. See also *United States* v. *Maxwell*, 383 F. 2d 437, 441 (C.A. 2), certiorari denied, 389 U.S. 1057; *Pietch* v. *United States*, 110 F. 2d 817, 819 (C.A. 10), certiorari denied, 310 U.S. 648.

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In The

Supreme Court of the United States

October Term, 1972

No. 72-142

JOHN J. RUISI and DOROTHY C. KORN,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY BRIEF

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STATUTE CITED:

18 U.S.C. §922(a)(1) 2

In The

Supreme Court of the United States

October Term 1972

No. 72-142

JOHN J. RUISI and DOROTHY C. KORN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY BRIEF

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Statement

This reply memorandum is submitted in support of petitioners' application to this Court for a Writ of Certiorari.

We respectfully submit that this Court should consider the recent case of UNITED STATES v. DALE PAUL GLUP, Criminal No. 01607, decided

by District Judge Denney of the United States District Court for the District of Nebraska on the 12th day of April, 1972. In that case Judge Denney was dealing with the same Statute involved herein, namely 18 U.S.C. §922(a)(1). He did not interpret the Statute the way the Government asks this Court to interpret it but, on the contrary, supported the position taken by the petitioners herein. He dismissed the indictment therein against Dale Paul Glup and, it is our understanding that the Government has not appealed that dismissal. The decision and opinion of District Judge Denney follows:

Memorandum and Order

[Filed April 12, 1972]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Crim. No. 01607

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
DALE PAUL GLUP,)
)
Defendant.)

APPEARANCES:

For Plaintiff — Thomas Thalken
Asst. United States Attorney
for the District of Nebraska

For Defendant — William Lamson,
of Omaha, Nebraska.

DENNEY, District Judge

This matter comes before the Court on numerous motions of the defendant. The determination of these motions becomes moot upon the Court's decision as to defendant's motion for an order of the Court dismissing the indictment against him [Filing No. 12]. -

Defendant is charged, in a single count, of violation of 18 U.S.C. §922(a)(1). The specific offense alleged is that defendant was an unregistered dealer in firearms. Apparently, some 89 weapons were seized, pursuant to a warrant, and the government possesses some documents and advertising materials which, if introduced into evidence, could probably prove dealing under the statute.

Defendant asserts several grounds in his motion, but only the second basis will be discussed here. In that attack upon the indictment, defendant asserts that the indictment is faulty for failure to charge a connection with interstate commerce.

Section 922(a)(1), under which defendant is charged, reads as follows:

§922. Unlawful acts
(a) It shall be unlawful —
(1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce . . .

The question presented is whether the last five words of the section modify the entire section or merely the phrase "to ship, transport or receive any firearm or ammunition."

If this statute requires that unlicensed dealing be in interstate or foreign commerce to constitute an offense, then defendant's attack will be grounded upon a failure to include that allegation within the indictment.

Reading the section as though the latter interpretation was correct results in the following application to this case:

§922. Unlawful acts
(a) It shall be unlawful —
(1) for any person, except a . . . licensed dealer, to engage in the business of . . . dealing in firearms or ammunition . . .

Reading the section as though the last five words apply to the situation in this case results in the following:

§922. Unlawful acts
(a) It shall be unlawful —
(1) for any person, except a . . . licensed dealer, to engage in the business of . . . dealing in firearms or ammunition . . . in interstate or foreign commerce . . .

The question involves the construction of ambiguous language. Neither of the above constructions is compelling upon the face of the statute.

The major case construing a statute passed under a companion title in the Omnibus Crime Control and Safe Streets Act is United States v. Bass, 404 U.S. 336 [1971]. The prosecution contends that the Bass decision should be narrowly limited to that particular section construed and rests wholly upon the ambiguity found and subsequent construction of the words therein. Bass dealt with 18 U.S.C. App. §1202(a)(1) contained in Title VII of the Act while the present case deals with 18 U.S.C. §922(a)(1), contained in Title IV of the Act.

The prosecutor is correct in that the ambiguity of 18 U.S.C. App. §1202(a)(1) cannot be allowed to infect each section of every Title of the Act. However, the section involved here possesses its own ambiguity. So finding, as in Bass, this Court must attempt to construe §922(a)(1) to determine the scope and effect of its language.

The Bass decision goes beyond the legislative history of the particular section involved because it could not clear the ambiguity by a reading of

that history. Resort to the history of a statute is the second-stage procedure of construing a statute. Subsequent to reviewing such history, if the murky waters have not yet cleared, the Court must apply rules of construction established, maintained and modified for decades by the Courts as the just, fair and consistent method of determining the scope and meaning of legislative pronouncements. Artificial as these rules may at times seem in relation to determining true legislative intent, they are the only tools by which courts may function as they must and probably result in a just, if not always correct, determination in the main.

This Court has already noted that the statutory language is reasonably open to at least two constructions. It is, thus, found to be ambiguous and not open to construction upon its face.

The second step is a determination of legislative intent from the legislative history of the statute. Although there are comments to the contrary, the Court finds that predominant throughout the debate of the Act is the concern that it not impair or impede state law enforcement. In fact, the Act was to promote more effective enforcement of local police regulations and bolster, not invade the states in their protection of their own citizens. The comments of some legislators notwithstanding, the Court finds sufficient diversity of opinion as to the coverage of the Act in the floor debates to warrant a finding of inconclusive legislative intent.

At this point, the Court finds the two major underpinnings of Bass directly applicable. In the language of the Bass decision:

> "Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."

404 U.S. at 347. And:

> "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance." (Emphasis added.)

404 U.S. at 349.

The Bass decision notes that the first rule of construction rests upon two policies. The first of these concerns the giving of fair warning of the limits of criminal conduct. Of all instances which can be imagined, surely the present one approaches the top of the list of situations calling for such a rule. As precious a right as the right to bear arms is, having been sewn into the living fabric of our Constitution, fair notice would be a prerequisite to the creation of an area of criminal conduct which heretofore has been honorable. If this statute were held to cover, given its present language, wholly intrastate dealing in firearms, this Court would be compelled to strongly question the statute, as applied to the offense charged against defendant in the indictment, as being unconstitutionally vague and ambiguous. To avoid such a problem, the construction given it here would be compelled at any rate.

Since the statute is here held not to reach wholly intrastate dealings in firearms, the question of Congress' power to reach such activities is not ruled upon. The Court would note, however, that such activities are peculiarly within the state police power and that the continued abuse of the commerce power to invade matters traditionally of state concern may lead to withdrawal from the overreach given that clause in areas outside the economic concerns of trade and travel.

The case of United States v. Gross, 313 F.Supp. 1330 (S.D. Ind. 1970), was a pre-Bass decision, and so far as it is inconsistent with this decision it is not found to be persuasive.

It is, therefore, the finding of this Court that the indictment against defendant is faulty in that it fails to allege a connection with interstate commerce and that such defect is fatal, requiring dismissal of the indictment. E.g., Russell v. United States, 369 U.S. 749 [1962].

IT IS THEREFORE ORDERED that the indictment be, and is hereby, dismissed.

Dated this 12th day of April, 1972.

BY THE COURT

s/ Robert V. Denney
Robert V. Denney
United States District Judge

Conclusion

The Petition for Certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioners